In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 201

HARVEY R. BITTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on February 6, 1967. A petition for rehearing was denied on April 20, 1967. The petition for a writ of certiorari was filed on May 27, 1967, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the question presented, relating to the trial court's order that petitioner be remanded to custody during trial, does not warrant further review.

Petitioner was convicted in the United States District Court for the Eastern District of Wisconsin, after trial before the court without a jury, on seven counts charging the use of the mails to execute a scheme to defraud (18 U.S.C. 1341.)[1] He was sentenced to concurrent terms of imprisonment for a year and a day on each count, together with a fine of $500 on each count (a total fine of $3,500). The court of appeals affirmed, one judge dissenting (374 F. 2d 744).

1. The evidence showed that, during the period at issue, petitioner was engaged in business in Milwaukee as a real estate and business broker. He would write to persons advertising in the local newspapers that they had businesses for sale advising them that he knew the place of business and had a buyer for it (App. 316-317, 137, 179, 281, 290-291, 297, 305, 311, 327). When the owner of the business called at petitioner's office, petitioner would give further assurances of his ability to make an immediate sale. The owner would be required to make a deposit of a sum ranging from $150 to $300 to cover anticipated expenses, with the promise that the money would be returned if the business were not sold (App. 181-182, 227, 282, 292, 297, 299, 305-306, 312, 327).

Neither petitioner, his salesmen, nor any serious prospects would actually visit the place of business (App. 182-183, 228, 293, 298-299, 316, 327). Appointments to bring in alleged prospects were unful-

[1] The court acquitted petitioner on seven other counts (App. 333). "App." refers to petitioner's appendix in the court below, copies of which are on file with the Clerk of this Court.

filled (App. 182-183, 327). Requests for return of the deposit at the termination of the contract were uniformly rejected (App. 284, 293, 306, 329). In one instance, the owner was even required to pay a fee for cancellation of the contract at the time of its expiration (App. 228).

Former salesmen for petitioner, who paid from $1,500 to $1,750 for the privilege of joining the organization, testified that during the periods of their respective employment no known sales of businesses occurred (App. 137, 147-148, 243, 258, 260). The secretary who worked for petitioner for four years knew of only one sale (App. 319).

After the close of the government's case, during petitioner's direct examination, petitioner's attorney offered in evidence an envelope (Defendant's Exhibit 171) relating to a negotiated sale (App. 347). When petitioner was asked whether he had similar envelopes and indicated that he had, the court declared a recess so that the documents could be marked and inspected by government counsel (App. 348).

At the resumption of proceedings, the clerk said he had marked the documents through the year 1963. Although it was then 4:03 p.m.—18 minutes after trial had been scheduled to resume—petitioner was not in the courtroom. He arrived at 4:20 p.m. The court, noting that petitioner had disrupted the trial and the court's work, directed the marshal to keep petitioner in custody during the remainder of the trial. Petitioner's counsel said he felt responsible for the delay, but the court ordered the defense to proceed, saying

there would be no more delays so far as the defendant was concerned (App. 349-350).

On the following morning at 9:15, petitioner's counsel moved for a mistrial on the ground that petitioner had been incarcerated in the Waukesha County jail. Petitioner corrected this statement, saying that he was held at the Kenosha jail. The motion was denied. Counsel then told the court that he had not had the opportunity to confer with petitioner concerning the testimony of government witnesses given the previous day, or to examine papers which petitioner had brought to court. The Assistant United States Attorney stated that the deputy marshal had brought petitioner to the court house, and that he had been available for conference, since 8:40 a.m. Petitioner's counsel replied that petitioner had on several occasions spoken to the deputy marshal about conferring with his counsel and had received the answer that he would be produced in court. He said that counsel had not been afforded the opportunity to confer with his client. Upon the court's inquiry, the deputy marshal stated that counsel had given no indication that he wished to see petitioner, that the deputy had advised petitioner that as soon as his counsel was available he could speak to him, and that counsel was walking into the courtroom when they approached. (App. 360-361). The court permitted a brief recess for a conference. The deputy marshal subsequently testified that, at the close of court on the previous afternoon, petitioner had been permitted to make telephone calls at the marshal's office, again at a gasoline service sta-

tion and again when they arrived at the jail. Petitioner did not call his attorney, and the attorney had not tried to communicate with petitioner (App. 450-454).

In an affidavit annexed to his motion for a new trial, petitioner stated that on Wednesday, when the court recessed at 3 p.m., he had gone to his office to obtain records material to his defense in the light of testimony given by government witnesses on that day; and that he had been delayed in traffic and prevented from returning until approximately 4:22 p.m., some 37 minutes later than the time set by the court. He stated that his confinement prevented him from getting records in his office of which he alone had knowledge and that these would show, contrary to the evidence offered by the government, that he had offered the properties by way of advertising (App. 568-577). In overruling the motion the court pointed out that the indictment had clearly indicated what the government was going to prove (App. 581).

2. The trial court's action in remanding petitioner to custody during trial was not based upon its power to punish contempt, but upon its inherent power to take appropriate steps to insure petitioner's presence and the orderly progress of the trial. *Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 683 (per Harlan, Circuit Justice); *United States* v. *Bentvena*, 288 F. 2d 442, 445 (C.A. 2); *United States* v. *DiPietro*, 302 F. 2d 612 (C.A. 2); *United States* v. *Rice*, 192 Fed. 720 (C.C. S.D.N.Y). Even if, as the court of appeals suggested, the action taken may have

been unnecessarily stringent, it did not constitute deprivation of the right to counsel. Consultation between attorney and client was possible both at the close of the afternoon session and the following morning before the court convened, but no efforts to that end were made by either petitioner or his counsel. The circumstance that petitioner was taken to a jail more distant than the one originally contemplated lacks significance, as neither he nor his lawyer tried to reach the other. The claim that petitioner was prevented by his incarceration from gathering documentary evidence to show that he had advertised the businesses listed with him is without substance ("incredible," the majority below thought; see Pet. App. 27), in view of the specific allegation relating to that matter in the indictment (App. 4, sub-paragraph (aa)).[2]

[2] There is no substance to the claim that petitioner was surprised by the government's closing its case earlier than expected. Petitioner states that the United States Attorney had previously indicated that "most if not all of Wednesday would be consumed by the government's case," the government rested early Wednesday afternoon (Pet. 4).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BITTER *v.* UNITED STATES.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 201. Decided October 16, 1967.

PER CURIAM.

Petitioner was tried on 18 counts of violating the mail fraud statute, 18 U. S. C. § 1341, and one count of using an assumed name, a violation of 18 U. S. C. § 1342. On the third day of trial, the Government rested its case. This was earlier than it had announced or than petitioner had anticipated. At recess time petitioner sought leave of the court to go to his office in order to gather additional evidence for the defense. Permission for this was granted. Forty-five minutes were alloted for the recess. Petitioner, who had previously appeared promptly at every session of the trial, was this time tardy by 37 minutes in returning to court. Without warning, hearing, or explanation, the trial judge ordered petitioner into custody for the balance of the trial. Attempts by petitioner's counsel to offer explanations for petitioner's lateness were to no avail.

Defense counsel was then advised that petitioner would be kept in custody in a county jail located some 18 miles from the court. In fact, petitioner was taken about 40 miles distant, to a different jail. Counsel's endeavors throughout the trial to obtain petitioner's release proved fruitless. Petitioner remained in custody for the duration of the trial. He was convicted on seven counts of mail fraud and given concurrent sentences of one year and one day on each count. He was also fined a total of $3,500.

Petitioner contended that his incarceration was unjustified and that it materially interfered with his right to counsel and severely impeded his defense. The Court

of Appeals for the Seventh Circuit affirmed the conviction. 374 F. 2d 744 (1967). We grant certiorari and reverse.

A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial. See *Fernandez* v. *United States*, 81 S. Ct. 642 (1961) (memorandum of MR. JUSTICE HARLAN in chambers); *Carbo* v. *United States*, 288 F. 2d 282 (C. A. 9th Cir. 1961); *Christoffel* v. *United States*, 196 F. 2d 560 (C. A. D. C. Cir. 1951).*

The record in this case shows only a single, brief incident of tardiness, resulting in commitment of the defendant to custody for the balance of the trial in a jail 40 miles distant from the courtroom. In these circumstances, the trial judge's order of commitment, made without hearing or statement of reasons, had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial. Punishment may not be so inflicted. Cf. Rule 42 of Fed. Rules Crim. Proc. (governing the contempt power). We therefore hold that the order was unjustified and that it constituted an unwarranted burden upon defendant and his counsel in the conduct of the case.

Accordingly, we grant certiorari and reverse the judgment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

---

*It does not appear whether defendant was at large on bail at the time of the order remitting him to custody. But the same principle would apply if he had been at liberty on his own recognisance. Cf. Bail Reform Act of 1966, 18 U. S. C. § 3146.